UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

KINETIC CONCEPTS, INC., KCI LICENSING, INC. KCI USA, INC. and WAKE FOREST UNIVERSITY HEALTH SCIENCES Plaintiffs,	§	
v.	§	No. SA-03-CA-0832--RF
BLUESKY MEDICAL CORPORATION, MEDELA AG, MEDELA, INC., and PATIENT CARE SYSTEMS, INC. Defendants.	§	

ORDER DENYING DEFENDANT BLUESKY'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' COUNTS XII, XIII, AND XV AND 12(b)(6) AND 12(c) MOTIONS TO DISMISS COUNT XIII OF PLAINTIFFS' COMPLAINT

BEFORE THE COURT is Defendant Bluesky Medical Group, Inc.'s Motion for Partial Summary Judgment on Counts Twelve, Thirteen and Fifteen and 12(b)(6) and 12(c) Motions to Dismiss Count Thirteen of Plaintiff's Complaint (Docket No. 188) and Plaintiffs' Response (Docket No. 231). After due consideration, the Court finds that Defendants' Motion should be DENIED.

Background information concerning this patent infringement matter has been set forth previously in the Court's Order Construing Patent '643 Claim Terms filed on June 28, 2005 (Docket No. 258).

STANDARD OF REVIEW

Summary judgment is appropriate if, after adequate time for discovery, no genuine issue as to any material facts exists, and the moving party is entitled to judgment as a matter of law.[1] Where the issue is one for which the nonmoving party bears the burden of proof at trial, it is sufficient for the moving party to identify those portions of the record which reveal the absence of a genuine issue of material fact as to one or more essential elements of the nonmoving party's claim.[2] The nonmoving party must then "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial."[3] To prevail on summary judgment, the moving party need only demonstrate that "there is an absence of evidence to support the nonmoving party's case."[4] Upon viewing the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party, the court, in order to grant summary judgment, must be satisfied that no rational trier of fact could find for the nonmoving party as to each element of his case.[5]

---

[1] Fed. R. Civ. P. 56(c); *Celotex Corp v. Catrett*, 477 U.S. 317, 322-24 (1986).

[2] *Celotex*, 477 U.S. at 323-24.

[3] *Id.* at 324.

[4] *Id.* at 325.

[5] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

DISCUSSION

Count XII – Common Law Business Disparagement

The elements of a common law business disparagement claim consist of the following: (1) publication of disparaging words by defendant, (2) falsity, (3) malice, (4) lack of privilege, and (5) special damages.[6] Defendant claims that Plaintiffs failed to point to specific statements that could be disparaging. The Restatement asserts that "a statement is disparaging if it is understood to cast doubt upon the quality of another's . . . chattels . . . and (a) the publisher intends the statement to cast the doubt, or (b) the recipient's understanding of it as casting doubt was reasonable."[7] Plaintiffs identify several statements published by Defendant that could reasonably be understood to cast doubt on the quality of their V.A.C. product. In one example, Plaintiffs point to a Bluesky advertisement that reads "Is tearing out healthy tissue part of your negative pressure protocol?"[8] Plaintiffs contend this statement casts doubt about the quality of the V.A.C. because it implies that the product "has a deleterious effect on wounds, and that removal of granulation tissue coincidental to a dressing change is unusual or unnatural."[9] However, Plaintiffs point to expert testimony which states that tissue removal is actually a

---

[6] *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762 ,766 (Tex. 1987).

[7] RESTATEMENT (SECOND) OF TORTS § 629 (1977).

[8] Pl. Ex. E

[9] Pl. Response to Def. Motion for Partial Summary Judgment (Docket No. 231) at p. 4.

natural consequence and a sign of healthy healing.[10] Plaintiffs offered sufficient proof beyond the pleadings to show there is a genuine issue of material fact as to the "disparaging words" element, therefore, summary judgment is not proper on this element.

With regard to the element of falsity, the Texas Supreme Court stated that "[j]ust as the substantial truth doctrine precludes liability for a publication that correctly conveys a story's 'gist' or 'sting' although erring in the details, these cases permit liability for the publication that gets the details right but fails to put them in the proper context and thereby gets the story's 'gist' wrong."[11] Defendant claims that Plaintiffs have failed to plead and prove the falsity of any statements made by Defendant. However, in its Response to this motion for summary judgment, Plaintiffs assert the falsity of several statements made by Defendant. One example about the tissue tearing with use of the V.A.C. is discussed above. In that scenario, it is true that tissue is torn, but the statement is crafted by Defendant so as to make tissue removal to seem to be an undesirable effect, which Plaintiffs' experts assert is not true. Additionally, Plaintiffs identified a document prepared by Defendant in which Defendant described the V.A.C. as "designed more for a single type of application."[12] In defense of the falsity element, Plaintiffs cite several

---

[10]Pl. App. Ex. F, Grischow Depo. at 92: 15-23; Pl. App. Ex. G, Dairman Depo, 20:19-25; Pl. App. F, Grischow Depo. at 20:13-16.

[11]*Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000).

[12]Pl. App. C, Ex. 23.

expert reports describing the multiple uses and sophistication of the V.A.C.[13] Resolving all doubts in favor of the non-movant, Plaintiffs have presented enough evidence to raise a genuine issue of material fact as to the truth or falsity of the statements made by Defendant.

Malice is an essential element of a business disparagement claim.[14] A defendant is liable for business disparagement "only if he knew of the falsity or acted with reckless disregard concerning it, or if he acted with ill will or intended to interfere in the economic interest of the plaintiff in an unprivileged fashion."[15] Defendant argues that it did not publish any statements with malice. Plaintiffs cite a letter from Defendant Weston to a KCI competitor in which Mr. Weston "described his marketing plan for Versatile 1 as an effort to 'contract[] the market from $400 million per year to $40 million per year and therefore sow[] the seeds of chaos and contraction into the marketplace."[16] The letter went on to state that Weston wished to "reduce and change the profit vector of the competition from Black to a glowing deep red hue."[17] The Court finds that this evidence raises a genuine issue of material fact as to whether Defendant "intended to interfere in

---

[13]Pl. App. D, Expert Report of Louis Argenta, M.D. at pp. 6-8; Expert Report of Jeffrey Niezgoda, M.D. at pp. 5-7; Expert Report of Dennis Orgill, M.D. at p. 6.

[14]*Hurlbut*, 749 S.W.2d at 766.

[15]*Id.*

[16]Pl. Resp. to Def. Partial MSJ at p. 8 (quoting App. Ex. H, Weston Depo Ex. 83).

[17]Pl. App. Ex. H, Weston Depo Ex. 83.

the economic interest of the plaintiff in an unprivileged fashion."[18] Therefore, summary judgment on this element is not proper.

Defendants argue that Plaintiffs are unable to "establish pecuniary loss that has been realized or liquidated as in the case of specific lost sales"[19] and, therefore, summary judgment is proper on the claim of business disparagement. Plaintiffs contend they are entitled to a continuance pursuant to Rule 56(f) as to the element of special damages. Plaintiffs point out that in the Parties' Joint Discovery Plan (Docket No. 33), the parties agreed to not conduct discovery on damages until the court had finished ruling on dispositive motions.[20] Plaintiffs argue that because no discovery has yet been done, it is not possible for them to respond to the special damages element at this time. The Court finds that damages discovery is necessary for Plaintiffs to identify liquidated or realized lost sales. Therefore, the Rule 56(f) Continuance is GRANTED and summary judgment on Plaintiffs' claim of business disparagement is DENIED.

Count XIII – Trade Libel

Fed. R. Civ. P. 12(b)(6) - Failure to State a Claim and Fed. R. Civ. P. 12(c) - Dismissal on the Pleadings

---

[18] *Hurlbut*, 749 S.W.2d at 766.

[19] *Id.*

[20] Aff. of L. Macon (Docket No. 221).

For purposes of a Rule 12(b)(6) Motion to Dismiss for failure to state a claim, the complaint must be liberally construed in favor of the plaintiff, and all the facts plead in the complaint must be taken as true.[21] Dismissal on this basis is a disfavored means of disposing of a case,[22] and district courts should avoid such dismissals "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[23] "The question therefore is whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief."[24] This is the same standard applied to Rule 12(c) Motions to Dismiss on the Pleadings.[25]

Libel is defamation in written form.[26] Defendant argues that since Plaintiffs refer to their cause of action as trade libel, a claim not recognized in Texas, their claim is barred. Although Texas courts do not recognize a claim for "trade libel" as stated in those terms, simply referring to the claim as trade libel but pleading the elements of libel, even without specific reference to the libel statute, is enough to survive a Rule 12(b)(6) or

---

[21] *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th Cir. 1986).

[22] *Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359, 365 (5th Cir. 2000).

[23] *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957).

[24] *Brown v. Nationsbank Corp.*, 188 F.3d 579, 586 (5th Cir. 1999) (citing 5 CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 601 (1969)).

[25] *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 313 n.8 (5th Cir. 2002).

[26] Tex. Civ. Prac. & Rem. Code § 73.001 (Vernon 1997).

a 12(c) dismissal.[27] Defendant further argues that Plaintiffs' cause of action should not be construed as a common law libel claim because libel is a statutory action in Texas. Therefore, Defendant asserts the claim should be dismissed under either Rule 12(b)(6) or Rule 12(c) because Plaintiffs did not cite § 73.001 of the Civil Practice and Remedies Code in their pleadings. However, in *Jetco*, relied upon by Defendant, the plainitff phrased its cause of action as "false disparagement" (trade libel), which the court said was not recognized as stated in Texas.[28] But, the court found the plaintiff to have sufficiently pled the elements contained in the libel statute even without specifically identifying the statute.[29] Viewing the complaint in the light most favorable to the Plaintiffs, the Plaintiffs have sufficiently pled a cause of action for libel. Therefore, Defendants Motion to Dismiss for Failure to State a Claim pursuant to Rule 12(b)(6) or Rule 12(c) is DENIED.

Summary Judgment

"To maintain a defamation cause of action, the plaintiff must prove that the defendant (1) published a statement; (2) that was defamatory concerning the plaintiff; (3) while acting with either actual malice, if the plaintiff was a public official or public figure, or negligence, if the plaintiff was a private individual, regarding the truth of the

---

[27] *Jetco Electronic Industries v. Gardiner*, 325 F.Supp. 80, 84 (S.D.Tex 1971).

[28] *Id.*

[29] *Id.*

statement."[30] A corporation may be libeled.[31] Defendant argues it did not publish any defamatory statements about Plaintiff, nor have they communicated them to a third party. However, publication only requires "a showing that the letter was received, read, and understood by a third person."[32] The defendant need only to have either negligently or intentionally communicated the defamatory statement to someone other than the person or corporation defamed.[33] Plaintiffs cite to a marketing letter produced by Defendant that contains the question: "Are you getting VACuumed by your current wound drainage company?"[34] The letter is directed to materials managers, which at least raises an inference that this letter was read by someone other than the Plaintiff. Therefore, summary judgment is not proper on the "publication" element.

In order for a statement to be defamatory about the plaintiff, "it is not necessary that the individual referred to be named if those who knew and were acquainted with the plaintiff understand from reading the publication that it referred to the plaintiff."[35] Defendant alleges that Plaintiffs have not pointed to any specific examples of statements that are defamatory and refer to Plaintiffs. However, Plaintiffs identify an expert report in

---

[30] *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998).

[31] *Jetco*, 3245 F.Supp. at 85.

[32] *Simmons v. Ware,* 920 S.W.2d 438, 444 (Tex.App-Amarillo, 1996).

[33] *Id.*

[34] Pl. Response to Partial MSJ (Docket No. 231), Ex. H.

[35] *Newspapers, Inc. v. Matthews*, 339 S.W.2d 890, 893-94 (Tex. 1960).

which health care professionals were shown Defendant's advertisements and asked about their impressions.[36] This study reported that 33.3% of physicians and 95.% of nurses in the sample believed Defendant's advertisements were comparing its product to the Plaintiffs' product.[37] Therefore, Plaintiffs have created a genuine issue of material fact as to whether people familiar with Plaintiffs would know that the advertising statements referred to them. As a result, summary judgment is not proper on this element.

The Texas libel statute defines libel as "a defamation expressed in written . . . form . . . that tends to injure a living person's reputation and thereby expose the person to . . . financial injury or to impeach any person's . . . reputation . . . and thereby expose the person to . . . financial injury."[38] Both Plaintiffs and Defendant have combined the elements of business disparagement and libel in this Motion and the Responses. These are two separate and distinct claims, and in *Hurlbut*[39] the Texas Supreme Court distinguished the two. The most important distinction for this Motion is that proof of special damages is an essential part of a business disparagement cause of action and must always be proved, whereas damages are presumed in defamation cases except in a few limited situations.[40] In an action for libel, "[o]nce injury to reputation is established, a

---

[36]Pl. Response to Partial MSJ (Docket No. 231), Ex. J Reisetter Report.

[37]*Id.* at ¶ 77.

[38]TEX. CIV. PRAC. & REM. CODE § 73.001.

[39]*See Hurlbut*, 749 S.W.2d 762.

[40]*Id.* at 766.

person defamed may recover general damages without proof of other injury."[41] As discussed above, Plaintiffs use the advertisement that queries "Are you getting VACuumed by your wound drainage company?" as an example of libelous advertising. They contend that this statement damages their reputation by inferring that Plaintiffs' product was overpriced and that they "were extracting exorbitant prices" for their product.[42] Plaintiffs' point to testimony by Dennert Ware stating that he knows of at least one account that Plaintiffs lost purportedly due to the Defendant's advertisements.[43] Viewing the evidence in the light most favorable to the nonmovants, this evidence is enough to create a genuine issue of material fact. Therefore, summary judgment is not proper on this element.

Defendant contends that any words it published were not false. The element of falsity was discussed fully above in the analysis of Plaintiffs' claim for business disparagement and is equally applicable to the claim of libel. As a result, summary judgment is not proper on this element.

Neither Plaintiffs nor Defendant alleges that Plaintiffs are a public figure for purposes of a libel action. Therefore, Plaintiffs need only raise a genuine issue of material fact as to whether Defendant was negligent in publishing the allegedly

---

[41] *Leyendecker & Associates, Inc. v. Wechter*, 683 S.W.2d 369, 374 (Tex. 1984).

[42] Pl. Surreply to Def. MSJ (Docket No. 329) at p. 24.

[43] Pl. Response to Def. Partial MSJ (Docket No. 231), Ex. K, Ware Depo at 63:12-19.

defamatory statements.[44] As discussed in the section on business disparagement, Plaintiffs presented enough evidence to raise an genuine issue of material fact as to actual malice, therefore, the evidence is sufficient survive summary judgment as to negligence. As a result, summary judgment is not proper on this element.

Therefore, summary judgment on Plaintiffs' claim of libel is DENIED.

COUNT XV --Conspiracy

Texas courts recognize claims of civil conspiracy if the following elements are met: (1) a combination of two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result.[45] The Texas Supreme Court has reasoned that generally in order for a conspiracy to occur, "'There must be an agreement or understanding between the conspirators to inflict a wrong against, or injury on, another, a meeting of minds on the object or course of action, and some mutual mental action coupled with an intent to commit the act which results in injury; in short, there must be a preconceived plan and unity of design and purpose, for the common design is of the essence of the conspiracy.'"[46]

---

[44] *WFAA-TV, Inc*, 978 S.W.2d at 571.

[45] *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 675 (Tex. 1998).

[46] *Schlumberger Well Surveying Corp.* v. *Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 856 (Tex. 1969).

As the movants in the Motion for Summary Judgment, Defendants have the initial burden of producing summary judgment evidence that conclusively negates at least one element of a conspiracy cause of action.[47] "Merely proving that [Plaintiff] lacks evidence to support an essential element of her cause of action does not conclusively prove that the element does not exist."[48] Furthermore, Plaintiff usually proves the "agreement" element of a civil conspiracy with inferences and circumstantial evidence.[49] Defendants have not conclusively negated any element of a civil conspiracy. Instead, the Motion repeatedly asserts that Plaintiffs have no evidence for various elements of a conspiracy, and Defendant supports these allegations primarily with deposition testimony from their own employees and employees of Medela. For example, Defendant cites deposition testimony of Mr. Quakenbush, president of Medela, and Mr. Weston, president of Bluesky, to support their claim that no conspiracy existed. However, "[s]tatements by alleged members of a conspiracy are not sufficient to conclusively establish the nonexistence of an agreement because such witnesses would have a strong motive to deny a conspiracy, and the statements are not readily controvertible."[50] This Court finds that Defendants have not met their summary judgment burden of proof.

---

[47] *Christiansen v. Sherwood Ins. Servs.*, 758 S.W.2d 801, 804 (Tex.App.--Texarkana 1988, writ denied).

[48] *Id.* (citing Gibbs v. General Motors Corporation, 450 S.W.2d 827 (Tex. 1970)).

[49] *Id.*

[50] *Id.*

Even assuming Defendants presented enough evidence to negate at least one of the elements of civil conspiracy, Plaintiffs offered sufficient evidence to raise a genuine issue of material fact. As stated earlier in this Order, conspiracy, especially the "agreement" element, is often proved by inferences and circumstantial evidence. Plaintiffs demonstrated the following: Defendant Weston submitted a business proposal to Medela seeking to compete with KCI, which Medela rejected for itself;[51] a short time after Defendant Weston left Medela, he formed Blue Sky to implement his business proposal;[52] at the time Defendant Weston resigned from Medela, he received a large severance package;[53] and since its inception, Blue Sky has been the number one purchaser of Medela's Vario C/I pump.[54] This evidence taken together could raise the inference that Medela and Blue Sky reached an agreement with regards to competing with KCI.

Defendant argues that there was no object of accomplishing an unlawful purpose, and that Plaintiffs attempt to improperly base their conspiracy claim on a breach of contract action. Plaintiffs have not argued that their claim for breach of contract is an underlying basis for conspiracy, but instead offer the contract claim as evidence to support their contention that Defendant Medela knew that Defendant Bluesky was

---

[51]Pl. App. Ex. M, Business Proposal New Business Venture Outline Brief (MINC008069).

[52]Pl. App.Ex. N, Weston's Separation Agreement with Medela.

[53]*Id.*

[54]Pl. App. Ex. O (Docket No. 223), Laurel Depo at 56.

engaging in unlawful practices. This Court recognizes that Texas law does not support an action for conspiracy based on a claim for breach of contract.[55] However, as Defendants point out, Plaintiffs assert thirteen other causes of action based in tort, each of which could support a conspiracy claim. Plaintiffs need not prove any of these tort claims at the summary judgment stage, but instead they must show that there is at least a material question of fact that one of these torts, which would be the overt, unlawful act, could be found to support a claim of conspiracy. "Liability for civil conspiracy depends on participation in an underlying tort for which the plaintiff seeks to hold at least one of the defendants liable."[56] But, on summary judgment, when a defendant does not conclusively negate the existence of one of the underlying tort claims, it then has not negated an essential element of the civil conspiracy claim.[57] In this case, Defendant has not successfully negated any of the underlying tort claims, therefore, summary judgment on the conspiracy claim is not proper.

Defendant asserts that Plaintiffs "have been unable to provide any evidence of injury or damage."[58] However, as mentioned earlier in this Order, "[m]erely proving that [Plaintiff] lacks evidence to support an essential element of her cause of action does not

---

[55]*San Saba Energy, L.P. v. McCord*, 167 S.W.3d 67, 73 (Tex.App.--Waco 2005).

[56]*Toles v. Toles*, 113 S.W.3d 899, 913 (Tex.App.-Dallas, 2003).

[57]*Id.*

[58]Def. Partial MSJ (Docket No. 188) at p. 14.

conclusively prove that the element does not exist."[59] Plaintiffs have cited to two primary areas regarding the element of damages. First, Plaintiffs identify Dennert Ware's deposition testimony in which he testifies about accounts Plaintiffs have lost due to Defendant's actions.[60] Additionally, Plaintiffs note that damages discovery has not yet begun, and is not set to begin until after the Court has ruled on dispositive motions.[61] All of this evidence taken together is sufficient to raise a genuine issue of material fact as to whether two or more people had a meeting of the minds to accomplish an unlawful act which proximately caused injury to the Plaintiffs. While certainly not conclusive, viewing the evidence in the light most favorable to the nonmoving party, this Court cannot find that no rational trier of fact could find for the Plaintiff. Therefore, this Court finds that Defendant Bluesky's Motion for Summary Judgment on Plaintiffs' Claim of Conspiracy should be DENIED.

---

[59] *Id.* (citing Gibbs v. General Motors Corporation, 450 S.W.2d 827 (Tex. 1970)).

[60] Pl. Ex. K, Ware Depo at 63:12-19.

[61] Aff. of L. Macon (Docket No. 221).

CONCLUSION

Accordingly, the Court ORDERS that Defendant Bluesky's Motion for Partial Summary Judgment on Counts XII, XIII, and XV and 12(b)(6) and 12(c) Motions to Dismiss Count XIII of Plaintiffs' Complaint (Docket No. 188) be DENIED.

It is SO ORDERED.

Signed this ___ day of November, 2005.

_____
ROYAL FURGESON
UNITED STATES DISTRICT JUDGE